Supreme Court, U. S.
FILED
OCT 23 1979
MICHAEL RODAK, JR., CLERK

Nos. 79-283 and 79-5256

In the Supreme Court of the United States

OCTOBER TERM, 1979

ARTHUR GIBBONS, PETITIONER

v.

UNITED STATES OF AMERICA

LEROY PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

MERVYN HAMBURG
JAMES A. HUNOLT
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-283

ARTHUR GIBBONS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79-5256

LEROY PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 602 F. 2d 1044.

---

[1]"Pet. App." refers to the appendix to the petition in No. 79-283.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1979. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari in No. 79-283 to and including August 24, 1979, and the petition was filed on August 20, 1979. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari in No. 79-5256 to and including August 10, 1979, and granted a further extension to and including August 24, 1979. The petition was filed on August 27, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in conducting the voir dire examination of prospective jurors.

2. Whether the district court improperly considered racial factors in sentencing petitioner Gibbons (No. 79-283).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to possess and distribute heroin, in violation of 21 U.S.C. 846.[2] Petitioner Gibbons was sentenced to 15 years' imprisonment to be followed by a special parole term for life. Petitioner Perry was sentenced to six months' imprisonment, to be followed by three years' special parole. The court of appeals affirmed, with one judge dissenting (Pet. App. A).

---

[2]Co-defendants Sidney Williams and James Cox pleaded guilty to the one-count indictment.

The evidence at trial showed that in 1974 Sidney Williams and Leroy Roper began selling heroin in Manhattan.[3] The heroin was supplied by petitioner Gibbons through an intermediary (Tr. 83-92).[4] In the fall of 1976, Roper and Williams began dealing more directly with Gibbons. In November 1976, Gibbons' "lieutenant," James Cox, delivered a quantity of heroin to Williams' apartment. A few days later, Williams gave Gibbons $1600 in partial payment for the heroin (Tr. 92-98, 100-102). Thereafter, Cox made regular deliveries of substantial quantities of street-grade heroin to Williams and Roper, who then distributed the heroin in the Harlem area (Tr. 104-107).

Williams fell in arrears on his payments to petitioner Gibbons during the course of the conspiracy. In June 1977, Gibbons met with Roper and Williams and reminded them that he had received only $9000 and that $3200 was still owed for the last delivery. Gibbons also complained that he was owed money for three prior deliveries. Williams apparently did not pay Gibbons the amount due and did not receive further deliveries of heroin (Tr. 186-211, 581-589; G. Exh. 16).

In August 1977 an undercover police detective agreed to sell Cox five cases of mannite, a heroin and cocaine dilutant, for $2700. Petitioner Perry provided $2700 to pay for the mannite (Tr. 255-257, 467-477, 759-761). Perry retained the mannite while Gibbons awaited another shipment of heroin (Tr. 257-258, 264, 768-771).

---

[3]Roper began cooperating with government investigators after his arrest in March 1977.

[4]"Tr." refers to the trial transcript. "J. Tr." refers to the March 29, 1978, transcript of the jury selection hearing.

Following his arrest, Gibbons admitted that he had become a narcotics dealer in 1972 or 1973 and that he had purchased heroin, diluted it, and sold it for distribution at a substantial personal profit (Tr. 864-868).

ARGUMENT

1. During the voir dire examination conducted by the trial judge, prospective jurors were asked whether they knew or had any relationship with the defendants or attorneys in the case, whether they had any dealings with the Drug Enforcement Administration, whether they had difficulties with the English language, whether they or their relatives or friends had been charged with crimes or had been the subjects of investigations, whether they had appeared as witnesses, whether they had previously served on a jury, whether they or their close relatives or friends were members of any law enforcement agency, and whether they had personal knowledge of the facts of the case (J. Tr. 7-19). The prospective jurors, whose names had been provided to counsel for petitioners, were individually asked to disclose their town or borough of residence for the past five years, their occupation for that period, their marital status, the occupation of their spouses, and whether they could be fair and impartial jurors (J. Tr. 21-46). The trial judge declined to require the prospective jurors to disclose their addresses or specific neighborhoods.[5]

[5]During voir dire, the trial judge denied a request by petitioner Perry for disclosure of the particular communities in which the prospective jurors resided (J. Tr. 22-23). Although the trial judge did not specifically state the basis for his ruling, it appears that it was made in order to protect the jurors (who were not sequestered) from harassment or outside influence. Attempts to threaten or influence jurors and witnesses have been made in a number of recent multi-defendant narcotics cases in the Southern District of New York. See *United States* v. *Barnes*, Nos. 78-1040, 78-1045, 78-1050, 78-1051, 78-1056, 78-1058-78-1061, 78-1063, 78-1067 (2d Cir. April 23, 1979), slip op. 5596-5597 & n.3, petition for writ of certiorari pending, No. 79-261. In *Barnes*, the court of appeals observed that "the 'sordid history' of multi-defendant narcotics cases tried in the Southern District was sufficient to put the trial court on notice that all safety measures possible should be taken for the protection of prospective jurors, including complete anonymity, namely, no disclosure of name or address." The court added that "It would be nothing short of irresponsible were a trial judge sitting in New York City to close his eyes to these circumstances." *Id.* at 5610.

Petitioners argue that the failure to inquire more specifically during the voir dire examination as to the area of residence of prospective jurors effectively denied them the right to exercise peremptory challenges (79-283 Pet. 5-10; 79-5256 Pet. 6-13).[6] There is no merit to this contention. The purpose of the voir dire examination is to preserve the right to trial by a competent and impartial jury. The scope of examination necessary to achieve this purpose rests in the broad discretion of the trial judge, as this Court has repeatedly held. See *Ristaino* v. *Ross*, 424 U.S. 589, 594-598 (1976); *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931); see also *Ham* v. *South Carolina*, 409 U.S. 524, 527-528 (1973); Fed. R. Crim. P. 24(a). Petitioners have wholly failed to demonstrate an abuse of the trial court's discretion in the circumstances presented here. See *Government of Virgin Islands* v. *Felix*, 569 F.2d 1274 (3d Cir. 1978).

Petitioners argue that the neighborhood in which prospective jurors reside is significant because it may disclose a source of potential bias or prejudice. Petitioners did not, however, offer this explanation at trial as their reason for seeking information about the residence of jurors, nor did they request the trial judge to ask additional questions directly exploring the issue of bias or

[6]A similar issue is raised in the pending petition for certiorari in *Thompson* v. *United States*, No. 79-5337.

prejudice.[7] As pointed out by the court of appeals, the trial court did not prevent petitioners from proposing supplemental questions designed to inquire into this subject (Pet. App. 15a). The court of appeals also correctly noted that "[w]hatever the attorney's power to strike a number of venirepersons at will may be, to recognize a correlative right to question at will—without in any way identifying the motivating concern—would strip the judge of his control over the proceedings" (*id.* at 14a-15a). Because petitioners did not request further questioning focused on bias or prejudice and did not explain their concern about this subject during the voir dire, the trial judge did not abuse his discretion in withholding information about the jurors' residences or otherwise in his conduct of the voir dire. See *United States* v. *Barnes*, *supra*, slip op. 5609-5614; *Government of Virgin Islands* v. *Flix*, supra, 569 F.2d at 1276-1278.[8]

While the dissenting judge in the court of appeals expressed the view (Pet. App. 20a-21a) that failure to require disclosure of a prospective juror's neighborhood can interfere with the exercise of peremptory challenges, the trial judge's limitation of the voir dire examination

---

[7]The trial judge specifically inquired of each juror if he or she could give the defendants a "fair and impartial" trial (J. Tr. 6, 15, 22-29, 31-45).

[8]Petitioners cite no authority supporting their contention that the trial judge abused his discretion by declining to require panel members to disclose their particular areas of residence. *Johnson* v. *United States*, 270 F. 2d 721, 724 (9th Cir. 1959), cert. denied, 362 U.S. 937 (1960), expressly recognizes that "[t]he scope of *voir dire* examination of jurors is within the sound discretion of the trial court * * * [and] it is not error for the trial judge to refuse to direct the jurors to give their residence addresses." *Wagner* v. *United States*, 264 F.2d 524, 528-529 (9th Cir.), cert. denied, 360 U.S. 936 (1959), approves questioning of the panel by the trial judge, with supplemental questions from counsel, the procedure followed in this case.

must be viewed in light of the need to protect the safety and privacy of jurors. It also must be viewed in the context of the voir dire examination actually conducted. Where, as here, the defendants do not seek to inquire into racial or other prejudice, and the trial judge effectively inquires into the background of each juror, the defendants are not denied an opportunity to exercise peremptory challenges. It is hard to credit petitioners' post-conviction speculations about some possible nexus between residence and racial bias in view of their lack of interest in propounding questions that might more directly probe the presence of bias in members of the venire. Moreover, the record provides no basis whatsoever for supposing that the trial court's conduct of the voir dire examination resulted in the selection of a biased jury panel. See *Aldridge* v. *United States*, *supra*, 283 U.S. at 310; *United States* v. *McDowell*, 539 F.2d 435, 437 (5th Cir. 1976).

2. Petitioner Gibbons claims (79-283 Pet. 10-12) that the trial judge improperly enhanced his sentence due to his race. Petitioner Gibbons, like the trial judge and petitioner Perry, is black.

The evidence at trial showed that Gibbons played a central role in the conspiracy to distribute heroin, and that he in fact procured heroin and supervised its distribution over a substantial period. The trial judge made the following observations in imposing sentence (5/9/78 Tr. 7):

> THE COURT: This gives me no pleasure, but I am not sure that you were not the biggest narcotics dealer in Harlem, but you did do a great deal. And I am sorry about the pain and suffering that this has caused your family, but that really is not my responsibility, that is your responsibility. I am reasonably certain, Mr. Gibbons, that you personally

> have some very good traits, that you are a loving father and have done some things personally that are good, but I cannot—I repeat: cannot—forget or forgive that you have spewed poison among your own people for no reason other than the fact that you wanted to make money.
>
> Heroin is a menace to Harlem and it has been very destructive to that community. I have a great deal of concern about that for obvious reasons.
>
> Accordingly, without any further lecture, I am going to give you the maximum sentence. I am going to sentence you to fifteen years' imprisonment and lifetime parole. Anything further?

Petitioner Gibbons argues that the foregoing remarks establish that his sentence was racially motivated.

It is apparent that the judge's stated concern about heroin distribution in Harlem was based on the effects of narcotics in that community. Imposition of sentence for deterrent purposes is appropriate, especially in an area where deterrence is most needed.[9] See *Williams* v. *New York*, 337 U.S. 241, 249 n.13 (1949). Moreover, the trial judge's remarks clearly reflect the extent and serious nature of petitioner Gibbons' criminal conduct, considerations that are entirely proper in imposing sentence.[10]

---

[9]More than half of the drug addicts in the United States are found in New York City. *Carmona* v. *Ward*, 576 F.2d 405, 412 (2d Cir. 1978), cert. denied, 439 U.S. 1091 (1979).

[10]Gibbons' reliance (79-283 Pet. 11-12) on *United States* v. *Diamond*, 561 F.2d 557, 559 (4th Cir. 1977), is misplaced. There the district court took into consideration the fact that the defendants had traveled from another jurisdiction to commit crimes within the district court's jurisdiction. The court of appeals held that "such considerations of parochialism" are impermissible in imposing sentence (561 F.2d at 559). Nothing in *Diamond* supports the proposition that a sentencing judge may not consider the seriousness of the offense, the need for deterrence, and the relative culpability of the defendant.

The trial judge's reference to the impact of heroin distribution in Harlem does not suggest that his sentencing decision was based on petitioner Gibbons' race. Rather, it reflects the trial judge's justifiable concern for protecting the community from the destructive effects of large-scale narcotics distribution.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

MERVYN HAMBURG
JAMES A. HUNOLT
Attorneys

OCTOBER 1979